BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALAN DALE McCLURE, DECEASED	)	
Claimant	)	
VS.	)	
	)	Docket No. 248,125
ALAN'S EXCAVATING, INC.	)	
Respondent	)	
AND	)	
	)	
SAFECO INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier appealed the preliminary hearing Order dated November 30, 1999 entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant was killed when the vehicle he was traveling in was lifted up by a tornado. Judge Clark ordered respondent to pay a medical transportation bill as a preliminary hearing benefit. The respondent and its insurance carrier appealed that decision and contend claimant's accident and death did not arise out of his employment. That is the only issue on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds as follows:

Judge Clark found that "the Claimant was injured out of and in the course of his employment with the Respondent on May 3, 1999." Respondent admits the accident occurred in the course of employment. Respondent contends the ALJ erred because, under the facts of this case, Kansas law requires a finding that Alan McClure's death did not arise out of his employment.

To be compensable, an injury by accident must arise out of employment.[1] To arise out of employment, there must be some causal connection between the injury and the

[1] K.S.A. 44-501(a).

employment.[2] An injury arises out of employment when it arises out of the nature, conditions, and incidents of employment and does not arise from a hazard to which the worker would have been equally exposed apart from the employment.[3]

For example, when an injury is attributable to a personal condition of the employee and no other factors contribute to the injury, the injury is not compensable.[4] When an injury results, however, from the concurrence of a neutral risk or a personal condition and an employment hazard, the injury is compensable.[5]

Unexplained falls and deaths appear to be the most clear cut of the neutral risk cases and the majority of courts will award compensation as long as the claimant can prove the accidental injury occurred within the course of the employment. However, a minority of jurisdictions in these cases will deny compensation unless the claimant can prove a causal connection between the employment and injury.

In regard to other injuries/accidents which can be analyzed under the neutral risk theory, Larson's finds an increasing number of courts allowing compensation by utilizing a "but for" analysis to satisfy the "arising out of" requirement in workers compensation acts. However, jurisdictions are not as apt to award compensation in neutral risk cases where the neutral risk involved is not an unexplainable fall or death.[6]

Respondent contends that the injury was not compensable because the hazard presented by the tornado is the same whether traveling for work or traveling for personal reasons. The risk is the same for the public generally. Therefore, the respondent argues, because claimant was equally exposed to the hazard as was the public generally, compensation should be denied.

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[2] Scott v. Wolf Creek Nuclear Operating Corp., 23 Kan. App. 2d 156, 159, 928 P.2d 109 (1996).

[3] 23 Kan. App. 2d at 159.

[4] Baggett v. B & G Construction, 21 Kan. App. 2d 347, 349, 900 P.2d 857 (1995).

[5] *See* 21 Kan. App. 2d at 350.

[6] In reference to neutral risks, Larson's states:

> An increasing number of courts are beginning to make awards whenever the injury occurred because the employment required the claimant to occupy what turned out to be a place of danger. A few frankly state that causal connection is sufficiently established whenever it brings claimant to the position where he or she is injured. Unexplained falls and deaths occurring in the course of employment are generally held compensable, sometimes on the strength of a presumption, either judicial or statutory, that injury or death occurring in the course of employment also arises out of the employment in the absence of evidence to the contrary.

1 Larson's Workers' Compensation Law, § 7 (1999).

In support of this argument, the respondent cites Covert v. John Morrell & Co., 138 Kan. 592, 593, 27 P.2d 553 (1933) and Rush v. Empire Oil & Refining Co., 140 Kan. 198, 34 P.2d 542 (1934). In Covert, a traveling salesman was injured by glass shards after someone in a passing vehicle intentionally threw mud at the windshield of his car. Our Supreme Court denied compensation because the salesman might have been traveling for pleasure as well as in his capacity as an employee. In other words, the attack did not arise out of employment because the salesman was not attacked due to his employment.[7]

Covert, however, is distinguishable from this case because Covert involved an intentional tort. Its holding is also called into question by Bennett v. Wichita Fence Co., 16 Kan. App. 2d 458, 459, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992), in which an employee suffered an epileptic seizure while driving. The injuries sustained in the resulting crash were compensable because driving the company vehicle increased the risk faced by the claimant.[8]

Covert was last cited by a Kansas court in Hensley v. Carl Graham Glass, 226 Kan. 256, 259, 597 P.2d 641 (1979), a case also involving an intentional tort. In Hensley, while the decedent was working on a roof top, he was shot by a sniper. Even though all people in the area were at risk from the sniper, the decedent was at an increased risk because he was nearer to the sniper than was the general public. As a result, his widow was awarded workers compensation benefits.[9]

Hensley, in line with Bennett and other more recent cases, concentrates not on the *peculiarity* of the risk but on the *increased exposure* to the risk.[10] The doctrine that the hazard must be peculiar to the employment (peculiar risk test) has been generally abandoned in workers compensation law.[11]

In the instant case, claimant's employment increased the risk from the tornado.[12] The exposure to the hazard which caused his death was increased by his being outside, on the road traveling. The hazard itself need not be peculiar to the employment as long

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[7] 138 Kan. at 595.

[8] 16 Kan. App. 2d at 460.

[9] 226 Kan. at 256-57, 262.

[10] *See* 226 Kan. at 261. *See also*, 1 Larson's Workers' Compensation Law § 6.03 (1999) (increased risk test is majority test in United States).

[11] 1 Larson's Workers' Compensation Law § 6.02 (1999).

[12] *See*, 1 Larson's Workers' Compensation Law § 5.02 (1999).

as the risk of exposure to the hazard is increased by the employment.[13] As a result, claimant's injury arose out of his employment.

The Appeals Board finds Mr. McClure's accident arose out of his employment and the preliminary hearing Order should therefore be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated November 30, 1999, entered by Administrative Law Judge John D. Clark, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

c: Kim R. Martens, Wichita, KS
Clifford K. Stubbs, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

[13] *See*, Faulkner v. Yellow Transit Freight Lines, 187 Kan. 667, 359 P.2d 833 (1961).